90-1283

(1)

No. _____

Supreme Court, U.S.
FILED
FEB 12 1991
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RICHARD A. DENHOLM,

Petitioner,

vs.

HOUGHTON MIFFLIN COMPANY and RIVERSIDE PUBLISHING COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

May a plaintiff, in Federal Court, who has accepted a remittitur as to out-of-pocket losses in a breach of contract cause of action, appeal a trial court's pretrial order excluding evidence of lost royalties and loss of reputation in the same cause of action?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

Petitioner, Richard A. Denholm, is the only party seeking review of this Judgment. The caption of the case reflects all parties to the proceeding.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
LIST OF ALL PARTIES TO PROCEEDING IN COURT OF APPEALS	ii
REFERENCE TO OPINION BELOW	1
CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED	2
FEDERAL QUESTION INVOLVED: HOW A DECISION OF THIS COURT WAS RAISED AND INTERPRETED BELOW	3
CONCISE STATEMENT OF THE CASE	8

REASONS FOR GRANTING THE WRIT 15

A. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE 9TH CIRCUIT IS IN CONFLICT WITH THE DECISION OF OTHER UNITED STATES COURTS OF APPEALS ON THE SAME MATTER 15

B. THE COURT OF FEDERAL APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE COURT'S OPINION IN DONOVAN V. PENN SHIPPING CO., 429 U.S. 648 (1977) 15

CONCLUSION 35

CERTIFICATE OF SERVICE
Follows Petition

APPENDIX A
Opinion of U.S. Court of Appeals for the 9th Circuit, Filed August 27, 1990.

APPENDIX B
Order of the U.S. Court of Appeals for the 9th Circuit Denying the Petition for Rehearing and Rejecting the Suggestion for a Re-Hearing En Banc, Filed November 14, 1990.

TABLE OF AUTHORITIES

Cases	Page(s)
Aaro, Inc. v. Daewoo International, 755 F.2d 1398 (11th Cir. 1985)	18, 24
Call Carl, Inc. v. BP Oil Corp, 554 F.2d 623 (4th Cir. 1977)	16, 17
Donovan v. Penn Shipping Company, 429 U.S. 648 (1977)	5,6,7,13, 15,16,19, 21,22,24, 25,26,27, 31,32,33, 35
Lanier v. Sallas, 777 F.2d 321 (5th Cir. 1985)	16,19,20, 21,22,23, 33,34
Ohio-Sealy Mattress Mfg. Co. v. Sealy Corporation, 585 F.2d 821 (7th Cir. 1978)	17,18,24, 33,34
Statutes	
28 United States Code,	
Section 1332(a)	9
Section 1441	9

Section 1446 9

Treatises

6 A. J. Moore & J. Lucas, Moore's Federal Practice, 2d. ed. (1989) 33

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OPINION BELOW

The opinion of the U.S. Court of Appeals for the 9th Circuit, dismissing, in part, and affirming, in part, the Judgment of the U.S. District Court for the Central District of California is reported at 912 F.2d 357 (9th Cir. 1990), and is reproduced as Appendix A, infra, at A-1-A-56.

The Order of the United States Court of Appeals for the 9th Circuit denying the petition for rehearing and rejecting the suggestion for a rehearing en banc is reproduced as Appendix B infra, at B-1.

No opinion was rendered by the United States District Court for the Central District of California.

IV. CONCISE STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The judgment of the United States Court of Appeals for the 9th Circuit was entered on August 27, 1990. A timely petition for a rehearing with suggestion for rehearing en banc was filed by petitioner on September 10, 1990, and denied on November 14, 1990. This petition for Certiorari is filed within 90 days of the date of said denial.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

FEDERAL QUESTION INVOLVED: HOW A DECISION OF THIS COURT WAS RAISED AND INTERPRETED BELOW:

A plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted, but a plaintiff may appeal from other parts of the judgment. Determining what constitutes part of a remittitur so that a plaintiff may not appeal therefrom after accepting remittitur, or what constitutes another part of the judgment that is appealable, is a question of federal law, even in a diversity case, and state practices are not relevant.

Proceeding to trial on a

single cause of action for breach of contract, petitioner herein, an author of mathematics textbooks, sought to recover three distinctly different types of compensatory damages: damages for lost royalties, damages for loss of reputation, and damages for out-of-pocket losses. The trial court, prior to the trial, issued an order precluding any evidence whatsoever of lost royalties or loss of reputation. At the trial, the only evidence petitioner was permitted to put forward concerning damages was his own testimony to the effect that he had spent $20,000 worth of his time working on the project. The jury returned a verdict in favor of the petitioner in the

amount of $100,000. Pursuant to a motion for new trial, the trial court ruled that it would grant a new trial unless petitioner accepted a remittitur wherein he would accept the lesser verdict of $20,000 for out-of-pocket losses in accordance with the evidence he put forward. Petitioner accepted the remittitur, stating on the record that he would not give up his right to appeal the order precluding evidence of lost royalties and loss of reputation.

Respondents requested dismissal of petitioner's appeal of the order excluding evidence of lost royalties and loss of reputation. They cited this Court's holding in Donovan vs. Penn

Shipping Co., 429 U.S. 648 (1977), wherein this Court held that a plaintiff cannot protest a remittitur he has accepted in an attempt to open it to challenge on appeal. Thus, Donovan stands for the proposition that a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted. Respondents argued that since the remittitur order concerning the lesser judgment for out-of-pocket losses involved the same cause of action as the order precluding evidence of lost royalties and loss of reputation, the other order could not be appealed. The Court of Appeals dismissed petitioner's

appeal from the trial court's order precluding evidence of lost royalties and loss of reputation, interpreting Donovan as delimiting "other parts of the judgment" from which an appeal can be taken to separate and distinct causes of action.

Petitioner's position, and that articulated by the dissent in the Court of Appeals, asserts that Donovan does not require a separate and distinct cause of action for an appeal to be taken where a remittitur has been accepted, but only requires that a remand not necessitate retrying those issues subject to the remittitur.

CONCISE STATEMENT OF THE CASE:

STATEMENT OF COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Plaintiff-Appellant Richard Denholm ("Denholm") sued his publisher, Houghton Mifflin Company ("Houghton Mifflin") and its wholly owned subsidiary, Riverside Publishing Company ("Riverside") (collectively "Defendants-Appellees") in Los Angeles Superior Court for tortious breach of contract and fraud arising out of a letter agreement to develop and publish a mathematics program for kindergarten through eighth grade. Appellees properly removed the case to the United States District Court for the Central District of

California pursuant to 28 U.S.C. Sections 1441 & 1446, which had proper diversity jurisdiction under 28 U.S.C., Sec. 1332(a).

The District Court dismissed the fraud claim on judgment on the pleadings, as it was filed beyond the applicable three-year California statute of limitations for fraud claims. California Code of Civil Procedure Section 338(4). The court later dismissed the tortious breach of contract claim on summary judgment, holding that the parties did not have a "special relationship", as required by California law. However, the court allowed Denholm to proceed on an amended complaint alleging an ordinary breach of contract claim.

Prior to trial, the court granted appellees' motion *in limine*, excluding the presentation of evidence by Denholm of damages from lost royalties and loss of reputation. The agreement, *inter alia*, provided for plaintiff to be senior co-author of a new mathematics textbook series to be published by defendants. The pre-trial conference order set forth certain stipulated facts, among them that as of the date of the agreement, plaintiff Richard A. Denholm was an experienced author of mathematics textbooks for use at elementary, secondary and college levels of education; also that Plaintiff, prior to the date of the Agreement, had acted as author or

co-author of more than 40 mathematics publications, including "Elementary Algebra, Parts I and II", Elementary Algebra, New Edition, Parts I and II", "Mathematics for Individual Achievement, Levels 1, 2, 3, 4, 5, 6, Grade 7 and Grade 8", and "Mathematics Plus", all of which were published by Defendant Houghton Mifflin.

Thus, at trial, the only evidence of damages presented was Denholm's testimony as to the reasonable value of the time he had devoted to the project - $20,000. The jury returned a verdict in favor of Denholm awarding him $100,000, which was reduced on appellees' motion for a remittitur

to $20,000. Denholm accepted the remittitur, reserving his right to appeal the exclusion of evidence of lost royalties and loss of reputation. The court issued an amended judgment vacating the judgment on the verdict and awarding Denholm $20,000 in accordance with the accepted remittitur.

Denholm timely appealed (1) the amended judgment; (2) the judgment on the verdict; (3) the pretrial order excluding evidence of damages for lost royalties and loss of reputation; (4) the summary judgment dismissal of the tortious breach of contract claim; and (5) the judgment on the pleadings dismissal of the fraud claim.

Defendants-appellees moved for dismissal of the appeal based on Denholm's acceptance of the remittitur relying on this Court's holding on Donovan v. Penn Shipping Co., 429 U.S. 648 (1977).

The Court of Appeals noted that Donovan "bars the appeal of a remittitur order that a plaintiff has accepted" (Appendix A, page A-12) and thus dismissed Denholm's appeal as to the amended judgment, the judgment on the verdict, and the pretrial order excluding evidence of damage of lost royalties and loss of reputation. Regarding Denholm's remaining points of appeal, the Court of Appeals affirmed the district court's dismissal of both the tortious

breach of contract claim and the fraud claim.

In the court's published opinion, Judge Hall dissented, and would allow Denholm to appeal the exclusion of evidence of lost royalties and loss of reputation, despite his acceptance of the remittitur as to out-of-pocket losses.

REASONS FOR GRANTING THE WRIT

A. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE 9TH CIRCUIT IS IN CONFLICT WITH THE DECISION OF OTHER UNITED STATES COURTS OF APPEALS ON THE SAME MATTER

This Court's holding in Donovan v. Penn Shipping Co., 429 U.S. 648 (1977), reaffirmed "the longstanding\rule that a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted."

The principle enunciated in Donovan is crystal clear, as far as

it goes. However, the next logical stage of interpretation, i.e. the determination of what constitutes a part of the remittitur as opposed to another part of the judgment, finds the circuit courts in conflict as they deal with cases on appeal wherein a remittitur order has been accepted as a part of the judgment below. There is no doubt that this is a question of federal law, even in a diversity case, and state practices are not relevant. Donovan, supra, at 649; Lanier v. Sallas, 777 F.2d at 321,325 (5th Cir. 1985).

The first case interpreting Donovan was Call Carl, Inc. v. B.P. Oil Corp. 554 Fed 2d, 623 (4th Cir. 1977), which happened to be a case

involving two causes of action, wherein the Fourth Circuit held that an appeal of an antitrust cause of action was permissible despite the fact that a remittitur order was accepted concerning a separate cause of action for fraud and deceit. The court did not state, however, that an appeal would lie only in a cause or action that was separate and distinct, and not in a cause of action wherein a remittitur order had been accepted.

Subsequent to the decision in Call Carl, Inc., the Seventh Circuit, in Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., at 585 Fed 2d 821 (7th Cir. 1978), a case involving, apparently, a single antitrust cause of action,

permitted an appeal of an order denying equitable relief despite the acceptance below of a remittitur order concerning money damages. Thus, in Ohio-Sealy, the determining factor was not separate causes of action but separate types of damages being sought.

More recently, the Eleventh Circuit, in Aaro, Inc.v. Daewoo Intern. 755 Fed 2d 1398 (11th Cir. 1985), was also faced with a case apparently involving a single cause of action for compensatory damages, but three different kinds of compensatory damages, and permitted an appeal of an order concerning commissions on unshipped orders despite the fact that there had been acceptance of a remittitur

concerning damages regarding orders that had been shipped.

At this point in the development of the Donovan progeny, there would appear to be no conflict within the circuits. An appeal was permitted despite the presence in the case of the acceptance of a remittitur, if the appeal was either of a separate cause of action from that concerning a remittitur order, or involved a separate remedy, or a separate classification of damages. The problem arose with the 5th Circuit's holding in Lanier v. Sallas, 777 Fed 2d 321 (5th Cir. 1985). Lanier, in an appeal concerning the denial of punitive damages, held that an appeal is not

permitted, the court finding that a cause of action for punitive damages was not separate and distinct from the claim for compensatory damages. The court held that "to recover punitive damages, the plaintiff would have to prove every element of her cause of action for medical malpractice and also prove malice or gross negligence". "Lanier, supra, at 325.

Whether or not the Lanier Court was correct, the rationale was not in conflict with the preceeding cases discussed, nor was it in conflict with the reasoning behind this Court's opinion in Donovan. The problem arose when

the Lanier court stated as follows:

"The supreme court has held in Donovan v. Penn Shipping Co., that a plaintiff cannot appeal the propriety of a remittitur order to which he has agreed in federal court. However, the acceptance of a remittitur on one count of a complaint does not bar an appeal from an adverse judgment with respect to an entirely separate and distinct cause of action." Lanier, supra, at 325. (emphasis added.) That statement is correct, and, again, is not in conflict with preceeding cases, or with this Court's holding on Donovan. Only when the 9th Circuit, in the instant case, characterized this statement from Lanier as formulating a "separate

and distinct cause of action" test, which all appellants must pass in order to appeal a judgment wherein a remittitur order had been accepted, does Lanier, and the holding of the 9th Circuit in the instant case, create a clear conflict within the circuits, as well as a misinterpretation of this Court's opinion in Donovan. The 9th Circuit, in the instant case, held as follows:

"We agree with the Fifth Circuit's analysis and adopt the 'separate and distinct' test enunciated in Lanier. Thus, in the present case, we must analyze whether each issue on appeal is a separate and distinct cause of action from the subject of the

remittitur." (Appendix A. pages A-18, & A-19). (emphasis added.)

It is respectfully submitted that the aforementioned statement from Lanier, though correct, was never intended to be a sine qua non, without which there can be no appeal. As stated in the dissent below, this is a "sweeping and unnecessarily mechanistic view" which "over-simplified both the Lanier decision and the nature of the events which occurred below in the instant case, leading to an absurd result." (Appendix A, pages A35, A36 & A37)

If the decision of the 9th Circuit in the instant case is

permitted to stand, it will clearly be in conflict with the 7th Circuit's opinion in Ohio-Sealy, and the 11th Circuit's decision in Aaro, Inc., both of which involved single causes of action (the 9th Circuit's attempt to distinguish Ohio-Sealy, at Appendix A, page A-18, footnote 3, and Aaro, Inc., at Appendix A, page A-16, footnote 2, notwithstanding). Further, such a holding would necessarily distort and so narrow this Court's opinion in Donovan, that it will inevitably lead to "a waste of time, money, judicial resources and be a disincentive to

acceptance of remittitur".

Appendix A, pages A-54, A-55.

B. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THIS COURT'S OPINION IN DONOVAN V. PENN SHIPPING CO., 429 U. S. 648 (1977).

In Donovan, this Court has held, clearly and succinctly, that a plaintiff in federal court whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted. Donovan, supra, at 545. The clear import of this decision, of course, is that a plaintiff in federal court may appeal any other aspect of a trial court's judgment, apart

from the remittitur order that he has accepted. But interpreting Donovan so as to bar an appeal from any cause of action that happens to involve a remittitur order, whether or not the judgment appealed from has anything to do with the remittitur order, amounts to a harsh distortion of the Donovan rule, which must inevitably lead to an absurd result, as in the case of bar. It appears safe to say that the reasoning behind the Donovan decision is to prevent a litigant from retrying an issue that has already been settled by the acceptance of a remittitur, thus having

benefitted from the certainty of the remittitur that he has accepted. The Donovan decision was never meant to hobble a plaintiff in federal court, so that he is punished for accepting a remittitur order, to the effect that he is precluded from appealing matters involving totally different evidence, on remand, from the subject matter of the remittitur order. This federal question of what constitutes the subject matter of a remittitur order as opposed to other parts of the judgment from which an appeal may be taken is critical and has a pervasive impact on the

economy of the courts as well as on considerations of substantial justice. Petitioner submits that a matter is involved, or intertwined, with the subject matter of a remittitur not because of proximity within the same cause of action, but only when remand would necessitate putting forward the same evidence and re-litigating the same questions that were the subject matter of the remittitur order.

In the instant case, Petitioner, Richard A. Denholm, was not allowed by the trial court to put forward evidence of lost royalties or loss of reputation.

It is from this order that he appeals. He was permitted only to put forward evidence concerning his out-of-pocket expenses, which he testified amounted to $20,000 worth of his time. Despite this testimony, the jury returned a verdict for Mr. Denholm in the amount of $100,000. Since there was evidence only of out-of-pocket losses, and since the only testimony in this regard was a loss of $20,000, Mr. Denholm accepted the remittitur in the amount of $20,000 rather than retry the case with the same evidence of his out-of-pocket losses and with the same order preventing him from seeking recoveries for lost royalties and loss of reputation. Conceivably,

after he had again testified that he spent $20,000 worth of his time working on this project, the jury could again return a verdict in the amount of $100,000, or some sum greater than the $20,000 testified to. This could go on indefinitely. But, even if the jury returned the verdict in the amount of $20,000 the second time around in conformity with the evidence, there is no conceivable reason why petitioner should have to go through the exercise of a retrial in order to gain the right to appeal an issue that has nothing whatever to do with the matter retried. Proving, on remand, loss of royalties and loss of reputation would involve completely different

proof, and witnesses, from that required to prove the out-of-pocket losses. This is the determining factor. It is not at all significant that the loss of royalties and loss of reputation are involved in the same cause of action as the out-of-pocket losses, or that all three types of losses are different kinds of compensatory damages. What matters, and it is respectfully submitted what motivated this Court in the Donovan decision, is the prevention of an appeal from a remittitur order. That is all. There was no intent, nor was there any need, to form arbitrary or artificial categorizations of subject matter, such as causes of action, or types of

damages, within which an appeal is barred when a remittitur order is issued. The sole determinant is: Is the appellant appealing from a remittitur order? Will remand be tantamount to a retrial of the specific issue which was the subject of the remittitur order?

The case at bar presents a perfect instance of the absurd result which must flow from veering away from the clear language of Donovan, and narrowing the rights of all appellants by the creation of irrelevant generic categories within which an appeal will not lie in the presence of a remittitur order, despite the fact that the ruling appealed from has nothing whatever to do with the remittitur

order.

As is noted by the majority below, as well as by the dissent, in 6 A. J. Moore & J. Lucas, Moore's Federal Practice, par. 59.08 [7], at 59-2042 to 205, 2d Ed. (1989), the proposition is stated more broadly, and in as uncomplicated a manner as in Donovan:

"...a plaintiff, however, may appeal from other parts of the judgment." (Appendix A, pages A-14, A-38)

Never before in federal law has an appellant been so delimited in the scope of his appeal in the face of the acceptance of a remittitur. But there is no point to it. There is no reason for it.

It works an injustice, while burdening the courts with plaintiffs' reluctance, now, to accept remittitur, consigned to a pointless retrial having nothing to do with the appeal they seek to preserve.

As discussed in the dissent below, the "Lanier Court did a rather poor job of distinguishing Sealy". (Appendix A, Pg. 9555.) And "Sealy was similar to the situation in the instant case in that both involved a plaintiff suing on a single cause of action, yet seeking two types, or measures, of damages" (Appendix A, Pages A-39, A-40).

The Ninth Circuit opinion below conflicts with this Court's

decision in Donovan vs. Penn Shipping Co., since it will prohibit appeals never intended by this Court to be barred. It will discourage the acceptance of remittiturs, which was never intended by this Court in the Donovan decision.

CONCLUSION

The Petition for Writ of Certiorari should be granted because the U.S. Court of Appeals for the Ninth Circuit has decided a federal question in a way that conflicts with this Court's opinion in Donovan vs. Penn Shipping Co., and has rendered a decision in conflict with the decision of another U.S. Court of Appeals on the same matter.

DATED: February 8, 1991

Respectfully submitted,

David E. Frank
A Professional Law
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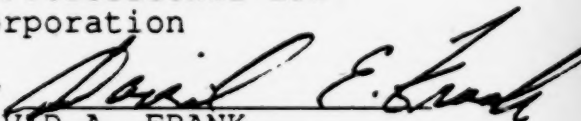
By 
DAVID A. FRANK
Attorney for Petitioner
RICHARD A. DENHOLM

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD A. DENHOLM, Plaintiff-Appellant,	)	No. 87-5987
	)	D.C. No.
	)	CV-85-3538-AAH
v.	)	
	)	OPINION
HOUGHTON MIFFLIN COMPANY and THE RIVERSIDE PUBLISHING COMPANY, Defendants-Appellees.	)	

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
A. ANDREW HAUK, DISTRICT JUDGE, PRESIDING

ARGUED AND SUBMITTED
OCTOBER 6, 1989 - SAN FRANCISCO, CALIF.

FILED AUGUST 27, 1990

BEFORE: THOMAS TANG, CYNTHIA HOLCOMB HALL
AND MELVIN BRUNETTI, CIR. JUDGES

OPINION BY JUDGE BRUNETTI; PARTIAL DISSENT
BY JUDGE HALL

SUMMARY

COURTS AND PROCEDURE/TORTS

Affirming the district court's judgment of dismissal, the court of appeals held that a plaintiff in federal court may not appeal from a remittitur order he has accepted, but may appeal from other parts of the judgment.

Appellant Richard A. Denholm sued appellee publisher Houghton Mifflin Company and its subsidiary the Riverside Publishing Company for tortious breach of contract and fraud arising out of a Letter Agreement to publish a mathematics program for kindergarten through eighth grade. The district court dismissed the fraud on judgment on the pleadings, as it was filed beyond the three-year California statute of limitations for fraud claims. The court later dismissed the tortious breach of contract claim on summary judgment because the parties did not have a special relationship as required by California law. The court allowed Denholm to proceed on an amended

complaint alleging ordinary breach of contract claim, but before trial, granted Houghton Mifflin's motion in limine, excluding the presentation of evidence by Denholm of damages from lost royalties and loss of reputation. The only evidence of damages he was allowed to present at trial was testimony as to the reasonable value of his time spent on the project, $20,000. The jury returned a judgment in favor of Denholm, awarding him $100,000 which was reduced on Houghton Mifflin's motion for a remittitur to $20,000. Denholm accepted the remittitur.

[1] In Donovan v. Penn Shipping Co., 429 U.S. 648 (1977), the Supreme Court reaffirmed the

longstanding rule that plaintiff in federal court may not appeal from a remittitur order he has accepted. Determining what constitutes a part of the remittitur or another part of the judgment is a question of federal law, even in a diversity case. [2] The court determined that the remittitur covered the first three points of Denholm's appeal, but not the last two, the dismissals of the tortious breach of contract and fraud claims. [3] Under California law, tort recovery for a breach of the covenant of good faith and fair dealing requires proof of a special relationship between the parties.

[4] The relationship in this case failed to meet any of the

required criteria. Denholm and his publishers were of equal bargaining stature, and both entered the relationship for profit. Denholm offered no evidence as to the inadequacy of ordinary contract damages, nor did he show he was in any way vulnerable or of necessity placed any trust in his publishers. Dismissal of this claim was proper.

[5] Under California law, fraud claims, have a three year statute of limitations. [6] Denholm filed his complaint almost five years after the commission of the alleged fraud and almost two years after the expiration of the statute of limitations. Denholm did not affirmatively allege facts in his complaint that he was not

negligent in failing to make discovery sooner as required by California law to excuse lateness of filing, nor did he affirmatively establish facts in his complaint that he was not on inquiry notice. Therefore, the court affirmed the district court's dismissal of the fraud claim.

Judge Hall dissented in part in a separate opinion, stating that he concurred in Parts II and III of the majority opinion, as well as much of Part I, but he dissented from the conclusion in Part I that Denholm may not appeal the pretrial order excluding evidence regarding lost royalties and loss of reputation because he accepted a remittitur. He would allow Denholm to

appeal the ruling in the in limine motion.

//

COUNSEL

Stanley Sklute, Gerald Goldfarb, Los Angeles, California, for the plaintiff-appellant.

Michael H. Diamond, Harriet S. Posner, Laura R. Medinnus, Skadden, Arps, Slate, Meagher & Flom, Los Angeles, California, for the defendants-appellees.

OPINION

BRUNETTI, Circuit Judge:

Plaintiff-Appellant Richard Denholm ("Denholm") sued his publisher, Houghton Mifflin, Co. ("Houghton Mifflin"), and its wholly owned subsidiary, Riverside Publishing Co ("Riverside") (collectively "Defendants-Appellees"), in Los Angeles

Superior Court for tortious breach of contract and fraud arising out a Letter Agreement to develop and publish a mathematics program for kindergarten through eighth grade. Appellees properly removed the case to the United States District Court for the Central District of California pursuant to 28 U.S.C. Sec. 1332(a).

The district court dismissed the fraud claim on judgment on the pleadings, as it was filed beyond the applicable three-year California statute of limitations for fraud claims. Cal. Civ. Proc. Code Sec. 338(4). The court later dismissed the tortious breach of contract claim on summary judgment,

as the parties did not have a special relationship as required by California law. However, the court allowed Denholm to proceed on an amended complaint alleging ordinary breach of contract claim.

Prior to trial, the court granted appellees' motion in limine, excluding the presentation of evidence by Denholm of damages from lost royalties and loss of reputation. Thus, at trial the only evidence of damages presented was Denholm's testimony as to the reasonable value of the time he had devoted to the project - $20,000. The jury returned a judgment on the verdict in favor of Denholm, awarding him $100,000, which was

reduced on appellees' motion for a remittitur to $20,000. Denholm accepted the remittitur. The court issued an amended judgment vacating the judgment on the verdict and awarding Denholm $20,000 in accordance with the accepted remittitur.

Denholm timely appeals (1) the amended judgment; (2) the judgment on the verdict; (3) the pretrial order excluding evidence of damages for lost royalties and loss of reputation; (4) the summary judgment dismissal of the tortious breach of contract claim; and (5) the judgment on the pleadings

dismissal of the fraud claim.[1] Defendants-Appellees, have moved for dismissal of the appeal based on Denholm's acceptance of the remittitur, relying on Donovan v. Penn Shipping Co., 429 U.S. 648 (1977).

Because Donovan bars the appeal of a remittitur order that a plaintiff has accepted, we dismiss Denholm's appeal as to the amended

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1 Although Denholm's notice of appeal did not list his appeal of the dismissal of the fraud claim, such a mistake is not fatal "as long as the intent to appeal a specific judgment can be fairly inferred and the appellee is not prejudiced or misled by the mistake." McCarthy v. Mayo, 827 F.2d 1310, 1314 (9th Cir. 1987) (quoting United States v. One 1977 Mercedes Benz, 708 F.2d 444, 451 (9th Cir. 1983), cert. denied, 464 U.S. 1071 (1984) (citation omitted). It can reasonably be inferred that the notice of appeal intended to appeal all of the district court's rulings. As appellees fully briefed the issue, they suffered no prejudice and were not misled. Thus, we will consider Denholm's appeal of this issue.

judgment, the judgment on the verdict and the pretrial order excluding evidence of damage for lost royalties and loss of reputation. Regarding Denholm's remaining points of appeal, we affirm the district court's dismissal of both the tortious breach of contract claim and the fraud claim.

I

ACCEPTANCE OF REMITTITUR

[1] In Donovan the Supreme Court reaffirmed "the long-standing rule that a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted". Donovan, 429 U.S. at 650. However, Donovan only

applies to an appeal attacking the correctness of the remittitur order, as a plaintiff may appeal from other parts of the judgment, 6 A. J. Moore & J. Lucas, Moore's Federal Practice, par. 59.08[7], at 59-204 to 205 (2d ed. 1989). Determining what constitutes a part of the remittitur or another part of the judgment is a question of federal law, even in a diversity case, and state practices are not relevant, Donovan, 429 U.S. at 649; Lanier v. Sallas, 777 F.2d 321, 325 (5th Cir. 1985)

In Lanier the Fifth Circuit recently addressed the Donovan decision. A plaintiff had won a

$100,000 verdict on a medical malpractice claim, but accepted a remittitur reducing the award to $50,000 rather than undergo a new trial. Lanier, 777 F.2d at 322. However, she then appealed the district court's refusal to submit her punitive damages claim to the jury. Id. The Fifth Circuit found that the punitive damages and compensatory damages claims were "inextricably intertwined" and held that the acceptance of the remittitur barred the claim. Id.

In its analysis the Lanier Court specifically ruled that under Donovan "the acceptance of a remittitur on one count of a complaint does not bar an appeal

from an adverse judgment with respect to an entirely separate and distinct cause of action." Id. at 325 (emphasis added).2

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2 The Fourth Circuit also has recognized and applied a "separate and distinct" test. See Call Carl, Inc. v. BP Oil Corp., 554 F.2d 623, 625-27 (4th Cir.), cert. denied, 434 U.S. 923 (1977) (directed verdict on an antitrust count is appealable notwithstanding acceptance of a remittitur on a fraud and deceit count; "[T]he reason for prohibiting direct appeals from remittiturs [do not] require such a result with respect to entirely separate and distinct causes of action once a remittitur has been accepted on one count of a complaint. "Id. at 627 (emphasis added)). See also Aaro, Inc. v. Daewoo Int'l (Am) Corp., 755 F.2d 1398, 1400-01, (11th Cir. 1985) (prior summary judgment on commissions from unshipped orders appealable notwithstanding acceptance of remittitur regarding tried claim on commissions from shipped orders: "[P]laintiffs appeal from...an order completely unrelated to the remittitur order. Hence, the instant case is not governed by Donovan." Id. at 1401 (footnote and citations omitted.)

The court then ruled that "[a] cause of action for punitive damages is not...separate and distinct from the underlying claim for compensatory damages." Id. (emphasis added). The court further noted that unlike the antitrust and fraud and deceit counts in Call Carl, Inc. v. BP Oil Corp., 554 F.2d 623, 625-27 (4th Cir.), cert. denied, 434 U.S. 923 (1977), the punitive damages claim was not distinct and could not be separately tried from the already tried compensatory damages claim. Lanier, 777 F.2d at 325-26. Rather, it was dependent on establishing liability for compensatory damages, as well as

establishing malice or some other aggravating circumstances. Id. Therefore, remand of the punitive damages issue would necessitate retrial of the entire case, and under such circumstances, "acceptance of the remittitur must put an end to the litigation." Id. at 326.[3]

We agree with the Fifth Circuit's analysis and adopt the "separate and distinct" test enunciated in Lanier. Thus, in the present case we must analyze

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3 While we are mindful that the Lanier Court did briefly discuss Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc. 585 F.2d 821 (7th Cir. 1978), cert. denied, 440 U.S. 930 (1979), as noted by the dissent, see dissent at 9554 [A-35], it endorsed and applied the "separate and distinct" test, focusing upon the inextricable intertwining of the two claims. See supra accompanying text; Lanier, 777 F.2d at 322, 325-26.

whether each issue on appeal is a separate and distinct cause of action from the subject of the remittitur.

Donovan clearly controls Denholm's first and second points of appeal, the amended judgment and the judgment on the verdict. The amended judgment is neither a separate nor distinct cause of action from the remittitur because it is the very subject of the remittitur, the ordinary breach of contract claim. The judgment on the verdict, like the amended judgment, is also neither a separate nor distinct cause of action; it also directly relates to the ordinary breach of contract claim. Because Denholm

does not dispute his acceptance of the remittitur, he consented to the amended judgment and the vacating of the judgment on the verdict. Although Denholm strenuously argues that he reserved his right to appeal when he accepted the remittitur, such protestations are not relevant. Donovan, 429 U.S. at 649. Thus under Donovan, he effectively waived his right to appeal either judgment. Therefore, we dismiss his first and second points of the appeal.

The remittitur also covers Denholm's third point of appeal, the pretrial order excluding presentation of evidence of damages from lost royalties and loss of

reputation. Denholm's amended complaint stated a single breach of contract claim and sought only one type of damages; compensatory damages. Although he attempted to present evidence of lost royalties and loss of reputation, which was rejected by the court, as well as the reasonable value of his time devoted to the project, which was admitted, all of this evidence relates to his single breach of contract claim for compensatory damages which was resolved by remittitur.[4]

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4 The actual language of the court's remittitur order specifically provided that "defendants' motion for a remittitur should be, and the same hereby is, granted and defendants are awarded a new trial on the issue of damages, unless plaintiff accepts a remittitur of the verdict and judgment." (emphasis added). This order, which addresses the trial and verdict on the single breach of contract compensatory

The evidence of lost royalties and loss of reputation is therefore not separate and distinct from the already litigated breach of contract claim for compensatory damages which was and, under such circumstances, acceptance of the

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damages claim in the complaint, necessarily encompasses all compensatory damage issues, including loss of royalties and loss of reputation.

We are unpersuaded by the dissent's position that the present case more closely resembles Sealy that Lanier. See dissent at 955 [A-43].; Sealy involved separate claims for both declaratory and injunctive relief, while Lanier involved a single claim and two interrelated measures of damages-compensatory and punitive. As in Lanier, the present case involves a single claim. While the dissent correctly notes that the excluded evidence of lost royalties and loss of reputation concerns separate measures of damages from the admitted evidence of the reasonable value of expended time, id., all of this evidence is directly related to the litigated breach of contract claim resolved by the accepted remittitur.

remittitur must put an end to the litigation of this claim. See Lanier, 777 F.2d at 326.5 We therefore dismiss Denholm's third point of appeal.

[2] However, we do not believe that the remittitur covers Denholm's final two points of appeal, the dismissal of the tortious breach of contract

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5 As the dissent notes, Denholm could have appealed the court's exclusion of evidence regarding lost royalties and loss of reputation if he had refused to accept the remittitur and, following the ensuing second trial, appealed the issue. See dissent at 9558-9559 [A-52, A-53 and A-54]. However, he knowingly chose to accept the remittitur, waiving his right to later appeal, and is bound by that decision.

While the dissent believes that this procedure is a "waste of time, money and judicial resources, and a disincentive to acceptance of remittitur", "see dissent at 9559, [A-54, A-55] the permissibility of the "either remittitur or new trial" decision has been uniformly accepted. See Dimick v. Schiedt, 293 U.S. 474 (1935); see also 11 C. Wright & A. Miller, Federal Practice and Procedure Sec. 2815, at 100-103 (1973)

and fraud claims. Upon review of the procedural history of this case, we find both dismissed claims to be separate and distinct from the ordinary breach of contract claim resolved by the remittitur. The court dismissed both of these claims prior to the filing of the ordinary breach of contracts claim. Moreover, these claims require different evidentiary showings from the ordinary breach of contract claim. Therefore, Denholm's appeal of the order dismissing the tortious breach of contract claim and his appeal of the order dismissing the fraud claim are properly before this court.

II

SUMMARY JUDGMENT - TORTIOUS BREACH OF CONTRACT

[3] Under California law, tort recovery for a breach of the covenant of good faith and fair dealing requires proof of a special relationship between the parties. Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 36 Cal. 3d 752, 768-69, 206 Cal. Rptr. 354, 362, 686 F.2d 1158, 1166 (1984); Wallis v. Superior Court, 160 Cal. App. 3d 1109, 1116-18, 207 Cal. Rptr. 123, 127-29 (1984); Eichman v. Fotomat Corp., 880 F.2d 149, 169 (9th Cir. 1989); Little Oil Co. v. Atlantic Richfield Co., 852 F.2d 441, 446 (9th Cir. 1988)

The characteristics of such a special relationship are:

(1) the contract must be such that the parties are in inherently unequal bargaining positions; (2) the motivation for entering the contract must be a non-profit motivation, i.e. to secure peace of mind, security, future protection; (3) ordinary contract damages are not adequate because (a) they do not require the party in the superior position to account for its actions, and (b) they do not make the inferior party "whole"; (4) one party is especially vulnerable because of the

type of harm it may suffer and of necessity places trust in the other party to perform; and (5) the other party is aware of this vulnerability. Wallis, 60 Cal. App. 3d at 1118, 207 Cal. Rptr. at 129. See Eichman, 880 F.2d at 169 (quoting Wallis); Little Oil, 852 F.2d 446-47 (quoting Wallis).

[4] The relationship in the instant case fails to meet any of the five criteria. Denholm and his publishers were of equal bargaining stature, as Denholm had been active in publishing for over twenty years and had published more than forty textbooks as of 1985. The months

of negotiation required to reach the Letter Agreement further illustrate the parties' equality. That both parties entered the relationship for profit is beyond dispute. Furthermore, Denholm offers no evidence as to the inadequacy of ordinary contract damages nor has he in any way vulnerable or of necessity placed any trust in his publishers. We find no evidence of a special relationship as required under California law and affirm the district court's dismissal of the tortious breach of contract claim.

III

JUDGMENT ON THE PLEADINGS - FRAUD

[5] Our review of the district

court's judgment on the pleadings dismissing the fraud claim is properly limited to the contents of the complaint; we must accept all allegations of fact as true and resolve all doubts in favor of the pleader. Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan, 662 F.2d 641, 647 (9th Cir. 1981), cert. denied, 469 U.S. 1229 (1985).

Under California law, fraud claims have a three year statute of limitations. Cal. Civ. Proc. Code Sec. 338(4). A plaintiff on a fraud claim brought over three years after the commission of the fraud must "affirmatively excuse his failure to discover the fraud within three years after it took

place, by establishing facts showing that he was not negligent in failing to make the discovery sooner and that he had no actual or presumptive knowledge of facts sufficient to put him on inquiry." Hobart v. Hobart Estate Co., 26 Cal. 2d 412, 437, 159 P.2d 958, 972 (1945) (citations omitted).

Such affirmation must be in the complaint. Silver v. Watson, 26 Cal. App. 3d 905, 911, 103 Cal. Rptr. 576, 580 (1972) ("To obtain the benefit of the late-discovery exception to the statute of limitations, the complaint must allege facts showing that the cause of action could not with reasonable diligence have been omitted)

(emphasis added); Holder v. Home Savings & Loan Ass'n 267 App. 2d 91, 110, 72 Cal. Rptr. 704, 717 (1968) ("[I]t is imperative that the plaintiff plead in his complaint facts showing the time and manner of the discovery of the fraud and the facts which excuse the plaintiff's failure to discover the fraud sooner." (emphasis added)).

This rule is strictly adhered to and has resulted in the dismissal of poorly pleaded fraud claims. See e.g. Orange County Rock v. Cook Bros. Equip. Co., 246 Cal. App. 2d 698, 703, 55 Cal. Rpts. 265, 268 (1966) ("Formal averments or general conclusions to

the effect that the facts were not discovered until a stated date, and the plaintiff could not reasonably have made an earlier discovery, are useless." (quoting Allen v. Ramsay, 179 Cal. App. 2d 843, 851, 4 Cal. Rptr. 575, 581 (1960) quoting II Witkin, California Procedure 1465); Jackson v. Master Holding Corp., 16 Cal. 2d 824, 828, 108 P. 2d 673, 375 (1940) ([E]ven under the most liberal relaxation of the rule [where] there is no showing of any inquiry at all, and no explanation is offered for the failure to make it except the vague averment that the facts were 'concealed'...[t]he pleading simply fails to meet the minimum requirement of a complaint for fraud which is filed more than

three years after its commission.").

[6] Denholm filed his complaint, which included the fraud claim, in April 1985, almost five years after the commission of the June 26, 1980 alleged fraud, and almost two years after the expiration of the three year statute of limitations. In the fraud claim, he merely alleges:

> Plaintiff discovered the fraud in March, 1984 when he learned that Defendants published a new mathematics program employing different authors. Prior to March, 1984, Plaintiff had no reason to suspect that Defendants would not employ him as

promised.

Denholm thus did not affirmatively allege facts in his complaint showing that he was not negligent in failing to make discovery sooner as required by California law to excuse lateness of filing, nor did he affirmatively establish facts in his complaint that he was not on inquiry notice. Although Denholm contends that extrinsic evidence, a February, 1983, letter, shows proof of concealment, our review is properly limited to the contents of the complaint. Portland Retail Druggists, 662 F.2d at 647, which alleges no such concealment. Therefore, we affirm the district court's dismissal of the fraud

claim.

Costs on appeal awarded to Houghton Mifflin and Riverside, defendants-appellees.

DISMISSED IN PART, AFFIRMED IN PART.

Judge HALL, dissenting in part:

Although I concur in Parts II and III of the majority opinion as well as much of Part I, I must dissent from the conclusion in Part I that Denholm may not appeal the pretrial order excluding evidence regarding lost royalties and loss of reputation because he accepted remittitur. The majority today adopts a sweeping and unnecessarily mechanistic view of which issues on appeal are sufficiently related to

a remittitur order to trigger application of the longstanding rule that a plaintiff in federal court who accepts an order of remittitur may not appeal that order. See Donovan v. Penn Shipping Co., 429 U.S. 648, 650 (1977) (per curiam). Persuaded by the Fifth Circuits's decision in Lanier v. Sallas, 777 F.2d 321, 325 (5th Cir. 1985), the majority opinion embraces an analysis that focuses on "whether each issue on appeal is a separate and distinct cause of action from the subject of the remittitur." Majority Opinion at 9547 [A-18, A-19] (emphasis added). Unfortunately, this analysis oversimplifies both the Lanier decision and the nature of

events which occurred below in the instant case, leading to an absurd result.

I

Contrary to what the majority implies, the Fifth Circuit in Lanier never stated that only "separate and distinct cause(s) of action" from the subject matter of a remittitur order may be appealed. Instead, the Fifth Circuit began its analysis with the uncontroversial proposition that in spite of a plaintiff's acceptance of remittitur on one cause of action, he may appeal the district court's ruling on a separate and distinct cause of action. See id.

at 325.[1] The court then proceeded to acknowledge the "slightly broader proposition that '[a] plaintiff may, however, appeal from other parts of the judgment.' "Id. (quoting 6A J. Moore, J. Moore's Federal Practice, Par. 59-08[7], at 59-205 to 206 (1984), without stating which formulation was preferable. Indeed, the Lanier Court cited Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc. 585 F.2d

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1 Indeed, a narrow reading of Call Carl, Inc. v. BP Oil Corp., 554 F.2d 623, 627 (4th Cir.) cert. denied, 434 U.S. 923 (1977), reveals that the Fourth Circuit, presented squarely with an attempted appeal concerning an entirely separate cause of action (antitrust) from the cause of action which was the subject of the remittitur order (fraud and deceit), simply held that such an appeal was permissible. The court did not state that only separate causes of action would suffice.

821 (7th Cir. 1978), cert. denied, 440 U.S. 930 (1979), as an example of the "broader proposition" regarding appealability, and then proceeded to distinguish rather than criticize it. Lanier thus cannot be read as establishing the appealability only of "separate and distinct cause(s) of action."

Lanier acknowledged with apparent approval that the Sealy court "permitted a plaintiff who had accepted a 50% remittitur on the award of damages to appeal the district court's denial of injunctive relief." 777 F.2d at 325. Thus, the situation in Sealy was similar to the situation in the instant case in that both involve a

plaintiff suing on a single cause of action yet seeking two types, or measures, of damages.[2]

The same could be said, of course, of the situation in Lanier itself, where a plaintiff suing on a legal malpractice theory sought both compensatory and punitive damages. Yet this only means that the Lanier court did a rather poor job of distinguishing Sealy. The Lanier court stated that whereas in

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2 The majority relies on the fact that Denholm's complaint sought generic breach of contract compensatory damages. Majority Opinion at 9548 n. 4. [A-21, A-22]. But such reliance amounts to pointless formalism and in the end proves nothing. For even if Denholm could only be properly said to have sought one type of damages, a review of the record makes it abundantly clear that the district court treated "various categories of evidence on this "simple" damage claim differently. This is all that should matter under the functional analysis I propose. See infra part II.

Sealy the question of injunctive relief of an antitrust theory could be decided separately from the question of damages on the same theory, the question of punitive damages could not be tried separately from the question of actual damages. Id. at 325. The Lanier court's conclusion was grounded on the fact that "the punitive-damage claim is dependent on establishing malice or some other aggravating circumstance." Id. at 325-26. From this the court concluded that the punitive damages claim "cannot be tried in isolation, and remand of that claim would necessitate retrial of the entire case." Id. at 326. Yet if

this is so, then why can the issue of injunctive relief be decided apart from the issue of compensatory damages, since both require an initial finding of liability?[3] Surely the Sealy court was correct in starting with the given of antitrust liability. The Lanier court, by contrast, never explained why a jury would be unable to decide a claim for punitive damages in isolation, starting with an instruction to the effect that actual damages have

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3 Admittedly, section 16 of the Clayton Act, which covers injunctive relief, only requires impending, as opposed to actual, antitrust injury; yet the Sealy court, see 585 F.2d at 844, inferred from the jury's damages verdict that an actual antitrust violation had already occurred.

already been found and hence the jury's only inquiry is to consider the possibility of malice.

In any event, Sealy is much closer to the instant case than Lanier is. For both Sealy and this case concern a single theory of liability with two separate measures of damages, either of which can be awarded without regard to whether the other is awarded. Lanier by contrast concerns a single theory of liability with two interrelated measures of damages, one of which cannot be awarded unless the other is first awarded.

Perhaps the difference, if there is one, between Lanier and Sealy is that in Lanier the

evidence that would be presented in a claim for punitive damages would necessarily consist of largely the same evidence that had already been considered with regard to actual damages, whereas the important factors in a claim for injunctive relief in Sealy would have to go much further, encompassing traditional equitable considerations. Houghton Mifflin's attorney focused on this difference at oral argument; she explained Lanier as establishing that when consideration of an issue will require presentation of the same evidence that was considered in the issue that was the subject of the remittitur order, the new issue

cannot be appealed.[4] But even if this reading of Lanier is correct, surely this case more closely resembles Sealy than it does Lanier, for Denholm is seeking to introduce entirely new evidence about royalties and reputation. He is not, as was the case with the appellant in Lanier, attempting to have the jury draw inferences of malice from the very same evidence

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4 Significantly, appellee's counsel never referred to Lanier as establishing an absolute rule requiring "separate and distinct cause[s] of action."

that was considered in the action for compensatory damages.

II

Once the majority's misguided reliance on Lanier is placed to one side, it is easy to see why the "separate and distinct cause of action" requirement works a pointlessly harsh result. The district judge in this case granted appellee's motion in limine to exclude the presentation of Denholm's evidence concerning damages from lost royalties and loss of reputation. At trial, Denholm made an offer of proof regarding lost royalty income, which the judge denied. At this

point the judge specifically informed the jury that evidence of lost royalties or lost reputation would not be admitted. The judge's jury instructions also admonished the jury not to award damages for potential lost royalties. The only evidence actually presented at trial of Denholm's damages was testimony to the effect that the value of the time Denholm had devoted to the project was $20,000. Nonetheless, the jury awarded Denholm $100,000, an amount that the district court reduced on appellee's motion for remittitur to $20,000.

Surely the jury erred, since it had not been presented with any

evidence whatsoever regarding Denholm's damages apart from the testimony regarding $20,000. Yet I fail to see how the majority can fairly characterize the in limine motion as directly related to the remittitur order accepted by Denholm. Although the remittitur order awarded a new trial generally "on the issue of damages[] unless plaintiff accepts a remittitur of the verdict and judgment," only by wilfully blinding itself to context can the majority disclaim that this order necessarily referred only to what had been presented at trial: damages for the value of Denholm's time spent preparing his book series. The subject of the

in limine order - loss of reputation - involved the same underlying breach of contract cause of action that the jury ultimately was called upon to decide, but it obviously represented an entirely different measure of damages from the reasonable-value-of-time-spent measure submitted to the jury at trial. Consequently, Judge Hauk's remittitur order represented a decision that the jury's verdict did not conform to the evidence introduced at trial regarding the value of Denholm's time; it did not decide anew whether lost royalties and/or loss of reputation damages were

available.[5]

In short, the remittitur order concerned a breach of contract trial whose parameters were strictly limited on the question of damages to the reasonable value of plaintiff's time spent on the project. As such, trial necessarily decided only two

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5 The judge admonished the jury that it not award such damages, and indeed no evidence was admitted during trial regarding lost royalties and loss of reputation. These facts affirmatively rebut any assumption that the jury considered improper measures of damages. We can thus only infer that the jury miscalculated the value of the time Denholm spent developing the mathematics program. Even if the jury disobeyed the judge and implicitly awarded damages for lost royalties and/or loss of reputation in its verdict, the remittitur order did not decide that such damage could not be awarded; instead, the order at most reflected the earlier, pretrial decision that such damages could not be awarded.

things: 1) defendants had breached their contract with Denholm; and 2) the value of Denholm's time spent on the project was $100,000. The court's remittitur order, by reducing the $100,000 to $20,000, itself necessarily also addressed only the value of Denholm's time. The order had nothing to do with lost royalty or loss of reputation damages.[6] By concluding otherwise simply because the remittitur order was broadly worded, the majority

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6 The situation in this cae is to be contrasted with a situation in which a plaintiff is allowed to introduce evidence at trial to prove lost royalty or loss of reputation damages yet thereafter accepts remittitur. In such a situation, the remittitur order obviously covers the entire cause of action. here, by contrast, the in limine order removed certain damages from consideration before the trial started.

inexplicably ignores the circumstances that led to the issuance of the order.

The majority posits a bright-line rule which is easily applied. Unfortunately, this is about all that the rule has to recommend itself. For it leaves no way for Denholm to appeal the district court's grant of the in limine motion in a reasonable amount of time. In the typical remittitur situation, the plaintiff has the option of having a second trial, where he may presumably offer better witnesses and more convincing evidence and hence win a favorable jury verdict that the

court will not disturb. At the very least, the possibility looms that while the second jury might award an amount identical to that awarded by the first jury based upon similar evidence, the court might at that point take pause and allow the award to stand. But in the instant case, the judge made a pretrial decision to exclude certain types of evidence. It is obvious that he would exclude the identical evidence at a retrial. Thus, under the "separate and distinct cause of action" rule, the only way for an appellant like Denholm ever to obtain appellate review of the initial in limine order would be to suffer through a

second trial that he knows will not help him obtain recovery for the only damages he has ever alleged, and then appeal.[7] This strikes me as a waste of time, money, judicial resources, and a disincentive to acceptance of

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7 Actually, the plaintiff may first seek review of the district court's order granting a new trial. See Ortiz v. St. Peter's Community Hosp. 861 F.2d 1440, 1451 (9th Cir. 1988). Yet in determining whether the district court abused its discretion by ordering a new trial, we would surely be unable to review the propriety of the initial grant of the in limine motion, unless the district court granted a new trial expressly on the basis that it erred in granting the in limine motion in the first palce. See id. at 1451-52. For we would review the grant of a motion for a new trial for "abuse of discretion as to each ground upon which the court based its determination." Id. at 1452 (quoting Peacock v. Board of Regents, Etc., 597 F.wd 163, 165 (9th Cir. 1979) (emphasis added). And in the case now before us it is certain that the district court threatened to grant the motion for a new trial solely because the jury's verdict on damages for the value of Denholm's time did not comport with the evidence presented at trial.

remittitur . Cf. Aaro, Inc. v. Daewoo Int'l (Am) Corp., 755 F.2d 1398, 1401 n.6 (11th Cir. 1985). Denholm does not argue here that the reasonable value of the time that he devoted to the mathematics project should properly exceed $20,000. Instead, he argues the separate issue that he was unable to present evidence to the jury concerning lost royalties and reputation damage.

I would adopt the view that plaintiffs may appeal from "an order completely unrelated to the remittitur order," id. at 1401, in a functional sense; see 6A J. Moore & J. Lucas, Moore's Federal Practice, par. 59.08[7], at 59-204

to 205 (2d ed. 1989) (although "a plaintiff in federal court may not appeal from a remittitur order he has accepted," he may "appeal from other parts of the judgment.") (emphasis added). Consequently, I would allow Denholm to appeal the ruling on the in limine motion.

No. 87-5987

(CERTIFICATE OF SERVICE BY MAIL - RULE 25, F.R.A.P.)

Yvonne A. Greve certifies that she is a citizen of the United States, over 18 years of age, a resident of the County of Los Angeles, and not a party to the within action; that her business address is 732 East Washington Boulevard, Los Angeles, CA 90021; that on the 10th day of September, 1990, she served the within Petition for Rehearing with Suggestion for Rehearing En Banc on the following named parties in said action, by placing one true copy thereof in an envelope addressed to the attorney(s) of record for said parties as follows:

Harriet Posner, Esq.
SKADDEN, ARPS, SLATE MEAGHER & FLOM
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Office of the Clerk
U.S. District Court
Attn: Hon A. Andrew Hauk
312 No. Spring Street
Los Angeles, CA 90012

and by then sealing said envelope and depositing the same, with postage thereon fully prepaid in the United States mail at Los Angeles, California; that there is

a delivery service by regular communication by United States mail between the place of mailing and the place so addressed.

I certify under penalty of perjury that the foregoing is true and correct.

Dated at
Los Angeles, California

September 10, 1990

_____

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD A. DENHOLM, Plaintiff-Appellant,	)	No. 87-5987 D.C. No. CV-85-3538-AAH
v.	)	ORDER
HOUGHTON MIFFLIN COMPANY and THE RIVERSIDE PUBLISHING COMPANY, Defendants Appellees.	)	

BEFORE: TANG, HALL and BRUNETTI, Circuit Judges

The panel has voted to deny the petiition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.O. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

No. 90-1283

Supreme Court, U.S.
FILED
MAY 20 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD A. DENHOLM,

Petitioner,

v.

HOUGHTON MIFFLIN COMPANY

and

THE RIVERSIDE PUBLISHING COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE PARTIES

Pursuant to Supreme Court Rule 29.1, the parent companies and subsidiaries (except wholly owned subsidiaries) of respondents are: None.

TABLE OF CONTENTS

	PAGE
THE PARTIES	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.	iii
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT.	8
I. The Ninth Circuit's Decision Is Consistent With Donovan And Earlier Decisions Of This Court.	9
II. There Is No Conflict In The Courts Of Appeals Concerning Appeals Of Remittitur Orders	21
CONCLUSION	31
APPENDIX I [PROPOSED] ORDER GRANTING DEFENDANTS' MOTION IN LIMINE . . .	A-1

TABLE OF AUTHORITIES

CASES	PAGE(S)
Aaro, Inc. v. Daewoo Int'l (America) Corp., 755 F.2d 1398 (11th Cir. 1985)	21,28
Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).	27
Call Carl, Inc. v. BP Oil Corp., 554 F.2d 623 (4th Cir.), cert. denied, 434 U.S. 923 (1977)	11-12, 22,23
Denholm v. Houghton Mifflin Co., 912 F.2d 357 (9th Cir. 1990).	passim
Donovan v. Penn Shipping Co., 429 U.S. 648 (1977). . .	passim
Donovan v. Penn Shipping Co., 536 F.2d 536 (2d Cir. 1976), aff'd, 429 U.S. 648 (1977).	10,17, 19
Holmes v. Wack, 464 F.2d 86 (10th Cir. 1972).	19
Kennon v. Gilmer, 131 U.S. 22 (1889)	11,19

CASES	PAGE(S)
Koenigsberger v. Richmond Silver Mining Co., 158 U.S. 41 (1895)	11,16
Lanier v. Sallas, 777 F.2d 321 (5th Cir. 1985)	21,24,25
Lewis v. Wilson, 151 U.S. 551 (1894).	10,16,28
Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821 (7th Cir. 1978), cert. denied, 440 U.S. 930 (1979) . .	22,26,27
Reinertsen v. George W. Rogers Constr. Co., 519 F.2d 531 (2d Cir. 1975).	19
Woodworth v. Chesbrough, 244 U.S. 79 (1917).	10-11
STATUTES	
U.S. Const. amend VII	27
28 U.S.C. § 1332(a)	2
28 U.S.C. § 1441.	2
28 U.S.C. § 1446.	2
Sup. Ct. R. 10.	8
Fed. R. Evid. 402	3
Fed. R. Evid. 403	3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-1283

RICHARD A. DENHOLM,

Petitioner,

v.

HOUGHTON MIFFLIN COMPANY and
THE RIVERSIDE PUBLISHING COMPANY,

Respondents.

Respondents Houghton Mifflin Company and The Riverside Publishing Company respectfully submit this brief in support of their request that the Court deny the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in Denholm v. Houghton Mifflin Co., 912 F.2d 357 (9th Cir. 1990).

STATEMENT OF THE CASE

Petitioner Richard A. Denholm filed a two-count complaint for tortious breach of contract and fraud in the Los Angeles Superior Court on April 23, 1985. Petitioner based his tortious breach and fraud claims on a two-page letter, which he alleged was an agreement by Respondents to publish, sight unseen, a mathematics textbook series to be written by him and others. Respondents properly removed the case to the District Court for the Central District of California on the basis of diversity jurisdiction. See 28 U.S.C. §§ 1332(a), 1441 & 1446.

The District Court dismissed the fraud count on Respondents' motion for judgment on the pleadings on statute of

limitations grounds. Respondents next moved for summary judgment on the tortious breach of contract count and the District Court granted it, giving Petitioner leave to amend his complaint to state an ordinary breach of contract count. Prior to trial, Respondents moved in limine to exclude as too speculative evidence concerning Petitioner's alleged loss of reputation and loss of future royalties from sales of textbooks that were in fact never written. The District Court excluded evidence on both of these elements of compensatory damages on the basis that the evidence was irrelevant and inadmissible under Federal Rules of Evidence 402 and 403. See Appendix I (January 7, 1987 Order Granting Defendants' Motion In Limine).

At trial, the only damages evidence Petitioner presented to the jury was his own testimony that the value of his time spent on the textbook project was $20,000. The jury awarded Petitioner $100,000, and, on Respondents' motion for a new trial and JNOV, the District Court ordered a new trial on the damages issue unless Petitioner accepted a remittitur to $20,000. Petitioner accepted the remittitur, the new trial order for respondents was rescinded, and an amended judgment for $20,000 plus costs was entered.

Denholm appealed the evidentiary rulings on the motion in limine as well as the dismissal of the fraud and tor-

tious breach counts.[1] Respondents filed a motion to dismiss the appeal on the grounds that, under this Court's decision in Donovan v. Penn Shipping Co., 429 U.S. 648 (1977) (per curiam), and subsequent decisions of the Courts of Appeals, Petitioner's acceptance of the remittitur precluded his appeal. The panel of the Ninth Circuit Court of Appeals was unanimous that Donovan did not bar Petitioner's appeal of the dismissal of the fraud and tortious breach counts.

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[1] Petitioner's notice of appeal did not specify that he was appealing the fraud claim, but the Ninth Circuit considered that issue because it was briefed by the parties. Denholm v. Houghton Mifflin Co., 912 F.2d 357, 359 n.1 (9th Cir. 1990). Denholm also appealed the judgment on the verdict and the amended judgment, and the Court of Appeals unanimously held that because he accepted the remittitur he could not appeal either judgment. Id. at 360; id. at 363 (Hall, J., concurring in part).

Denholm v. Houghton Mifflin Co., 912 F.2d 357, 361 (9th Cir. 1990); id. at 363 (Hall, J., concurring in part). The Court concluded that these two counts were "separate and distinct from the ordinary breach of contract claim resolved by the remittitur," were dismissed prior to the filing of the breach of contract claim, and required "different evidentiary showings" from the remitted claim. Id. at 361. Ruling on the merits, the court unanimously affirmed the District Court's dismissal of the fraud and tortious breach counts. Id. at 361-63; id. at 363 (Hall, J., concurring in part).

A majority of the panel held that Petitioner's acceptance of the remittitur prevented him from challenging the district court's pretrial evidentiary

rulings limiting the types of evidence of compensatory damages on the contract claim. The majority reasoned:

> [A]ll of this evidence relates to his single breach of contract claim for compensatory damages, which was resolved by remittitur. The evidence of lost royalties and loss of reputation is therefore not separate and distinct from the already litigated breach of contract claim for compensatory damages and, under such circumstances, acceptance of the remittitur must put an end to the litigation of this claim.

Id. at 360-61 (footnotes and citation omitted).

The dissent argued that an appeal should be allowed from an order completely unrelated to the remittitur order "in a functional sense." Id. at 366. The dissent stated that one could not "fairly characterize the in limine order as directly related to the remit-

titur order accepted" by the Petitioner. Id. at 365. The dissent suggested that the remittitur order addressed only the value of Petitioner's time spent on the textbook project and not the excluded evidence on the other asserted elements of compensatory damages for breach of contract. Id.

REASONS FOR DENYING THE WRIT

Petitioner has cited no "special and important reasons" warranting a grant of the writ of certiorari. Sup. Ct. R. 10. The decision below is consistent with this Court's decision in Donovan v. Penn Shipping Co., 429 U.S. 648 (1977). Furthermore, contrary to Petitioner's assertions, there is no conflict between the decision of the

Ninth Circuit below and the decision of any other United States Court of Appeals. The Petition alleges no other justification for review in this Court and there is in fact none.

I. The Ninth Circuit's Decision Is Consistent With Donovan And Earlier Decisions Of This Court

The rule applied by the Ninth Circuit in this case is consistent with the language and policy supporting this Court's decision in Donovan. In Donovan, the Court reaffirmed "the long-standing rule" that "a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted." 429 U.S. at 650. The Court affirmed the Second Circuit's decision, which held that the plaintiff's accep-

tance of a remittitur of his judgment barred his appeal of the trial court's decision finding the damages verdict unsupported by the evidence and ordering remittitur or a new trial. Donovan v. Penn Shipping Co., 536 F.2d 536, 537-38 (2d Cir. 1976), aff'd, 429 U.S. 648 (1977).

The decision in Donovan confirmed the many early Supreme Court decisions preventing a plaintiff from appealing an accepted remittitur order. 429 U.S. at 649. The Court had previously made clear that a plaintiff agreeing to a remittitur, though he had valid grounds for appeal, "waive[s]" those rights "for the sake of obtaining immediate satisfaction of his claim" and "consent[s]" to the reduced judgment. Lewis v. Wilson, 151 U.S. 551, 555 (1894); see Wood-

worth v. Chesbrough, 244 U.S. 79, 82 (1917); Koenigsberger v. Richmond Silver Mining Co., 158 U.S. 41, 52 (1895); Kennon v. Gilmer, 131 U.S. 22, 30 (1889). This rule barring appeals reflects the compelling interest in the finality of accepted remittitur orders. The plaintiff, having secured the benefit of immediate judgment by accepting remittitur, cannot "seek[] to retract the condition upon which it was obtained." Woodworth, 244 U.S. at 82; accord Koenigsberger, 158 U.S. at 52. As the Fourth Circuit concluded in analyzing Woodworth, this Court "was unwilling to permit a successful litigant to secure a conditional judgment and at the same time seek to retract the condition upon which that judgment was obtained." Call Carl, Inc. v. BP Oil Corp., 554 F.2d

623, 626 (4th Cir.), cert. denied, 434 U.S. 923 (1977).

In the present case, the Ninth Circuit applied Donovan in determining what parts of Petitioner's action was settled by his acceptance of the remittitur of the contract damages award. The court recognized that "a plaintiff may appeal from other parts of the judgment," even though he or she may not appeal that part settled by the remittitur order. Denholm v. Houghton Mifflin Co., 912 F.2d 357, 359-60 (9th Cir. 1990). Consistent with the policies underlying the longstanding practice of remittitur, the court stated that Petitioner could not appeal those parts of the judgment that were not "separate and distinct" from the remittitur order he had accepted. Id. at 360. The court concluded that

the evidentiary rulings on proof of compensatory damages were not sufficiently "separate and distinct" from the remittitur order on the contract claim, but that the fraud and tortious breach claims were distinct and permitted an appeal on those issues. Id. at 360-61.

Petitioner complains about the court's statement that the "separate and distinct" standard calls for an analysis of "whether each issue on appeal is a separate and distinct cause of action from the subject of the remittitur." Id. at 360. Yet this statement conflicts with neither Donovan nor this Court's earlier decisions. As discussed above, those decisions speak of a remittitur order as finally resolving a claim. See supra pp. 10-12. The Ninth Circuit in Denholm follows those deci-

sions by refusing to permit an appeal based on any claimed errors in the underlying judgment when the plaintiff has accepted a remittitur and thereby consented to that judgment.

The finality principles underlying Donovan and this Court's other decisions must mean that the plaintiff's settlement of a cause of action by accepting the benefits of remittitur waives appeal of possible errors in rulings on that cause of action. Here, the in limine rulings excluded as unreliable certain of the evidence concerning damages on Petitioner's contract claim. There is no principled ground for permitting Petitioner to appeal the in limine rulings without opening up to challenge on appeal most of the underlying rulings concerning the contract claim that were

made during the course of pretrial and trial proceedings. For example, an evidentiary ruling at trial excluding hearsay evidence supporting additional losses from the breach of contract could be challenged on appeal. Such a ruling would also satisfy Petitioner's verbal formulation that it "involv[e] totally different evidence, on remand, from the subject of the remittitur order," Cert. Pet. at 27, because the first jury would not have been permitted to consider that evidence.

The rule urged by Petitioner (and the dissent below, 912 F.2d at 366) would deprive remittitur orders of any meaningful finality. It would leave the parties uncertain as to what had been settled by the remittitur order, engendering additional appeals. Rather than

resolving this cause of action, compare Lewis, 151 U.S. at 555, under Petitioner's rule the remittitur order would only serve to enable Petitioner to seek a retrial where his contract damages would be guaranteed at a minimum of $20,000.

Petitioner's position is wholly incompatible with this Court's decisions, which speak of a remittitur order as finally resolving a claim and waiving all errors concerning that claim. See Koenigsberger, 158 U.S. at 52 (By accepting remittitur, plaintiff "waived all right to object to the order of the court."). This line of "unbroken precedents," Donovan, 429 U.S. at 649, none of which intimate that some exception to the bar of appeals exists, compel the conclusion that Petitioner cannot appeal

pretrial orders concerning the remitted contract claim. Petitioner's situation is not unique: he found himself in the same position as any plaintiff facing an order of a new trial or remittitur and, once he accepted the remittitur, Donovan barred his appeal on the contract claim.

Petitioner's contention that the decision forces pointless retrials is unpersuasive. Cert. Pet. at 29-30. The same argument was made in the Donovan case, 536 F.2d at 539 (Feinberg, J., dissenting), and rejected by the Second Circuit and this Court. 536 F.2d at 537-38 (2d Cir. 1976), aff'd, 429 U.S. 648 (1977). As such it is an attack on the rule in Donovan that appeals do not lie from remittitur orders, and must be rejected for the reasons previously given herein. On another level, the con-

tention makes no sense because remittitur can be offered only where a new trial would otherwise be ordered, and thus it allows a plaintiff to avoid a retrial rather than forcing such a result.

Moreover, two erroneous assumptions underlie Petitioner's spectre of pointless retrials. First, Petitioner assumes that a second jury would accept at face value his claim of the value of his lost time. Petitioner's only evidence supporting the $20,000 judgment was his own self-serving testimony of the value of his time. Cert. Pet. at 11, 29. Respondents would have the right to discredit that estimate on cross-examination before a jury at a retrial, placing Petitioner's $20,000 judgment at risk. As the Second Circuit recognized in Donovan, permitting a plaintiff to

appeal a remittitur order deprives the defendant of the "valuable" right "to have a second jury consider the issue of damages" where the first jury's verdict is excessive. 536 F.2d at 538; see Kennon, 131 U.S. at 30.[2]

Second, Petitioner incorrectly assumes that the same in limine rulings would invariably apply at a retrial. In granting the motion in limine, the judge wrote by hand on the order that it was

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[2] Contrary to Petitioner's assertion of pointless retrials, the Second Circuit in Donovan, 536 F.2d at 538, pointed to its earlier decision in Reinertsen v. George W. Rogers Constr. Corp., 519 F.2d 531 (2d Cir. 1975), in which it affirmed a judgment where the first jury verdict was $75,000, the plaintiff declined a remittitur that would have resulted in a $45,000 judgment, and the second jury awarded just $16,000. See Holmes v. Wack, 464 F.2d 86 (10th Cir. 1972) (affirming judgment where first jury awarded $15,000, plaintiff declined remittitur to $5000, and second jury awarded no damages).

"subject to further order of the Court," see Appendix I, and on retrial Petitioner might have persuaded the District Court to reconsider its rulings. Such interlocutory orders are subject to revision prior to entry of final judgment, and there is no guarantee that as a general matter a second trial will be a mirror of the first. A retrial enables the District Court to further refine its rulings and permits the second jury to approach the case in a setting tempered by the lessons learned in the first trial. There is simply no basis for Petitioner's assumption that a retrial would be a pointless exercise.

II. There Is No Conflict In The Courts Of Appeals Concerning Appeals Of Remittitur Orders

The decision of the Ninth Circuit in the present case is consistent with the few circuit court decisions since Donovan involving appeals of remittitur orders that were claimed to have affected only part of a judgment. The decision below reflects the prevailing rule that a plaintiff accepting a remittitur order may appeal only those parts of the judgment that are "separate and distinct" from that part upon which the remittitur order is granted. See Lanier v. Sallas, 777 F.2d 321, 325 (5th Cir. 1985) ("separate and distinct from the underlying claim"); Aaro, Inc. v. Daewoo Int'l (America) Corp., 755 F.2d 1398, 1401 (11th Cir. 1985) ("an order completely unrelated to the remittitur or-

der"); Call Carl, Inc. v. BP Oil Corp., 554 F.2d 623, 627 (4th Cir.) ("separate or divisible controversies"), cert. denied, 434 U.S. 923 (1977); cf. Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 843-44 (7th Cir. 1978) (permitting appeal of denial of injunctive relief following remittitur on damages but not discussing basis for doing so), cert. denied, 440 U.S. 930 (1979).

Petitioner claims that there was no conflict in the Court of Appeals until the Ninth Circuit rendered its decision here. Cert. Pet. at 19-22. According to Petitioner, the Ninth Circuit's statement that the appealed-from ruling must relate to a separate and distinct cause of action from that remitted creates the conflict. Id. at 22-23. As previously shown, the Ninth Circuit's

statement is consistent with the decisions of this Court and thus, not surprisingly, does not create a circuit conflict.

Petitioner does not claim that the decision below conflicts with Call Carl, in which the Fourth Circuit permitted an appeal of the trial court's granting of a directed verdict on the antitrust count, even though acceptance of the remittitur order barred appeal of the fraud and deceit counts that were tried and remitted. The Fourth Circuit stated: "[W]e do not think that the reasons for prohibiting direct appeals from remittiturs require such a result with respect to entirely separate and distinct causes of action once a remittitur has been accepted on one count of a complaint." 554 F.2d at 627. Similarly,

here the Ninth Circuit permitted petitioner to appeal the dismissal of his claims for fraud and tortious breach while barring only his appeal concerning the issue of damages for breach of contract, which he in effect settled by accepting the remittitur.

Petitioner also does not claim a conflict between the present decision and the Fifth Circuit's recent decision in Lanier, nor is there one. There the Fifth Circuit ruled that a plaintiff's acceptance of a remittitur order on her medical malpractice count barred her appeal of the dismissal of punitive damages for medical malpractice (but did not bar appeal of the dismissal of a legal malpractice claim against another defendant). 777 F.2d at 325-26. Just as here, the Fifth Circuit reasoned that

the punitive damages claim was not sufficiently "separate and distinct" from the compensatory damages claim because it was dependent on establishing liability for compensatory damages and could not be tried in isolation, thus "acceptance of the remittitur must put an end to the litigation" over the medical malpractice claim. Id.[3]

There is also no conflict between Ohio-Sealy and the present case. In an attempt to suggest a parallel between the nonappealable evidentiary rulings on contract damages here and the Seventh

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[3] Notwithstanding the similarity of reasoning employed by the Fifth Circuit and the Ninth Circuit, and the Ninth Circuit's explicit adoption of Lanier's "separate and distinct" test, Denholm, 912 F.2d at 360, Petitioner admits that the Fifth Circuit's rationale in Lanier does not conflict with this Court's decision in Donovan. Cert. Pet. at 20-21.

Circuit's decision, Petitioner claims that in Ohio-Sealy "the determining factor was not separate causes of action but separate types of damages being sought." Cert. Pet. at 18. However, the court in Ohio-Sealy did not permit the appeal of a denial of one element or type of damages after a remittitur had been accepted on the underlying cause of action but, instead, permitted the appeal of a claim for injunctive relief.

The request for injunctive relief in Ohio-Sealy was clearly separate and distinct from the damages claim for the antitrust violation because, after the plaintiff had accepted a remittitur on damages, the trial court held hearings on the request for an injunction. 585 F.2d at 824, 844. This sequence of events shows that the remittitur order

could not have settled the later-decided injunctive relief claim. The court also noted that the claim for injunctive relief involved different elements than the claim for damages, further evidencing that the two were separate and distinct. Id. at 844. Finally, the claim for injunctive relief was an equitable matter reserved for decision by the judge and thus was separate and distinct from the remitted jury verdict.[4] In contrast, the present case involved a challenge to pretrial evidentiary rulings concerning the conduct of the dam-

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[4] The court noted that the request for an injunction did not require retrying issues settled by the remittitur order because, under established principles of collateral estoppel and the Seventh Amendment, see Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), the trial court could not reconsider issues decided by the jury in the earlier damages trial. 585 F.2d at 844.

ages trial on the contract claim -- a claim fully resolved by the remittitur order. See Lewis, 151 U.S. at 555.

Petitioner's attempt to tease a circuit conflict out of the Eleventh Circuit's decision in Aaro is equally unavailing. Petitioner admits that it is not clear from the Aaro opinion whether it involved a single cause of action. Cert. Pet. at 18 (asserting that it "apparently" involved a single cause of action). The Eleventh Circuit stated only that the order granting summary judgment for the claim for commissions on unshipped goods was "completely unrelated to the remittitur order" on the tried claim of commissions owed on shipped goods. 755 F.2d at 1401.

There is no conflict with Aaro because the test employed by the Eleventh

Circuit there would result in the same outcome here. The evidentiary rulings in the present case concerned what evidence could be relied upon to prove contract damages, which were the subject of the remittitur order, and thus those rulings are not "completely unrelated" to the remitted contract damages claim. Furthermore, because the Eleventh Circuit in Aaro did not specify how it would determine if claims were "completely unrelated" and did not discuss whether the unshipped goods were a separate cause of action from the shipped goods, it is impossible to conclude that the Aaro case conflicts with the Ninth Circuit's decision.

In short, the Ninth Circuit's decision was a correct application of Donovan and its predecessors and does not

create a conflict with any other United States Court of Appeals' decision. There is no reason for this Court to review the judgment or to disturb the finality of the remittitur order to which Petitioner consented.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: May 17, 1991.

Respectfully submitted,

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APPENDIX

APPENDIX I

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD A. DENHOLM, Plaintiff, vs. HOUGHTON MIFFLIN COMPANY, et al., Defendants.	)	Case No. CV-85-3538-AAH (Kx) [PROPOSED] ORDER GRANTING DEFENDANTS' MOTION IN LIMINE

Having heard on December 15, 1986 the Motion in Limine filed by defendants Houghton Mifflin Company and The Riverside Publishing Company, the Court rules as follows [, subject to further order of the Court:][1]

1. As to Specification 1 of the Motion, seeking to exclude all evidence

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[1] Handwritten in original.

as to matters which took place after June 30, 1981, the Motion is denied.

2. As to Specification 2 of the Motion, seeking to exclude any evidence as to purported injury to plaintiff's reputation as an element of damage allegedly caused by defendants' supposed breach of contract, the Court grants the Motion, and finds and rules that such evidence is irrelevant and inadmissible under Federal Rules of Evidence 402 and 403.

3. As to Specification 3 of the Motion, seeking to exclude any evidence as to royalties or future income claimed to be lost by plaintiff from sales of the putatively authored work as an element of damage allegedly caused by defendants' supposed breach of contract, the Court grants the Motion, and finds

and rules that such evidence is irrelevant and inadmissible under Federal Rules of Evidence 402 and 403.

4. All evidence relating to the issues referenced in Specifications 2 and 3 of defendants' Motion in Limine as referenced in paras. 2 and 3 hereof is excluded and plaintiff is prohibited from offering any evidence relating thereto. Counsel for plaintiff is also instructed to refrain from referring to the excluded issues or evidence relating thereto in any remarks to the jury.

DATED: ~~December __, 1986~~ [January 7, 1987][2]

A. ANDREW HAUK
UNITED STATES DISTRICT JUDGE

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[2] Handwritten in original.

Presented By:

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

By William A. Masterson /s/
William A. Masterson

Attorneys for Defendants
HOUGHTON MIFFLIN COMPANY and
THE RIVERSIDE PUBLISHING COMPANY